



INTERIOR BOARD OF INDIAN APPEALS

Alfonso Robles v. Sacramento Area Director, Bureau of Indian Affairs

23 IBIA 276 (03/29/1993)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ALFONSO ROBLES

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-45-A

Decided March 29, 1993

Appeal from the denial of a second request for adult vocational training services.

Reversed and remanded.

1. Indians: Education and Training: Vocational Training--
Indians: Financial Matters: Financial Assistance

Bureau of Indian Affairs Manual provisions restricting second requests for adult vocational training services are without the force of law when sought to be applied against parties outside the Bureau.

APPEARANCES: Alfonso Robles, pro se; Ronald Jaeger, Sacramento Area Director, Bureau of Indian Affairs, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Alfonso Robles seeks review of a December 7, 1992, decision issued by the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), denying appellant's second request for adult vocational training (AVT) services. For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision, and remands this matter to the Area Director with instructions to issue a new decision based upon the regulations in 25 CFR Part 27.

Background

The documents submitted with appellant's notice of appeal show that he applied to the Central California Agency, BIA, for AVT services. Appellant admits that he completed a course in 1982 in auto body and fender repair at the California Trade Technical School with BIA AVT assistance. The Agency Superintendent denied appellant's request for further AVT assistance in a July 28, 1992, letter.

Appellant appealed the Superintendent's denial to the Area Director, who, on December 7, 1992, upheld the denial. The Area Director's letter states:

In your Statement of Reasons you cite that you are entitled to repeat training services pursuant to 25 CFR Part 27.5(e) Selection of Applicants. [1/] Although repeat training services is not defined in 25 CFR it is addressed in 82 BIAM, the Bureau's Adult Vocational Training manual. Repeat training services are for individuals who because of illness or other justifiable problems were unable to complete their initial training program. Under no circumstances are individuals who have completed a training program eligible for repeat services, with the exception being that if the individual is no longer able to work in their field of training because of medical problems.

Appellant's notice of appeal to the Board indicates that he continues to believe that he is eligible for repeat services. He argues:

The letter from the Area Director states that the CFR does not define repeat services and made reference to 82 BIAM. However a copy of this section was not furnished to me. I further researched the CFR and was unable to find reference to the BIAM under CFR 27.5 for further definition of repeat services.

After reviewing appellant's notice of appeal and the Area Director's decision, on January 25, 1993, the Board ordered the Area Director to show cause why his decision should not be reversed. The Board's order stated:

The Area Director based his decision on 82 BIAM. The Board does not have a copy of this section of the manual. However, it has previously considered the effect of a provision appearing in the BIAM, but not in the regulations. 5 U.S.C. § 552 (1988) states:

A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided in this paragraph; or

1/ Section 25 CFR 27.5(e) provides:

"No more than two (2) repeat training services will be allowed. Repeat training services will be on a lower priority than the initial service and will be determined on an individual basis, considering need, ability, prior performance and present motivation of the applicant. In order to be in need of repeat institutional training, an applicant must be unemployed, underemployed, or unable to work in his/her primary occupation due to physical or other disabilities. Time spent in on-the-job training programs will be deducted from the maximum of institutional training eligibility."

(ii) the party has actual and timely notice of the terms thereof.

Holding that the BIAM is an internal operating manual, not published and made available within the meaning of section 552 and whose provisions consequently do not have the force and effect of law, the Board has consistently declined to apply against a party [other than the agency] any statement of policy, interpretation, or staff instruction which appears only in the BIAM. See, e.g., Bekis v. Acting Navajo Area Director, 22 IBIA 47 (1992); Carter v. Acting Billings Area Director, 20 IBIA 195 (1991); Allen v. Navajo Area Director, 10 IBIA 146, 162-65, 89 I.D. 508, 517-18 (1982). See also Morton v. Ruiz, 415 U.S. 199 (1974). [2/]

The Area Director's response to the Board's show-cause order states:

It has been the policy of the Sacramento Area office that individuals who have received prior AVT services are on a lower priority than the initial service. This is consistent with the language in 25 CFR Part [27.5(e)]. It has also been our policy to follow the guidelines in 82 BIAM with respect to individuals who have completed a vocational training program, the exception being if the individual is no longer able to work in his field of training because of medical problems. A person who has completed a training program is considered to be employable and would not meet the regulations in 25 CFR Part [27.5(c)]. [3/]

2/ In Ruiz, the Supreme Court considered a requirement published only in the BIAM limiting eligibility for BIA general assistance to persons living on reservations. The Court stated at 415 U.S. 232-35:

"The Administrative Procedure Act [5 U.S.C. §§ 551-559 (1988)] was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. * * *

* * * * *

"* * * The only official manifestation of this alleged policy of restricting general assistance to those directly on the reservations is the material in the [BIAM] which is, by BIA's own admission, solely an internal operations brochure intended to cover policies that 'do not relate to the public.'"

(Quotation from 0 BIAM 1.2 (1968)).

3/ Section 27.5(c) provides:

"An applicant must be in need of training in order to obtain reasonable and satisfactory employment or is underemployed and without additional training would result in extreme hardship for the applicant, and is in need of financial assistance in order to obtain such training [sic]. It must also be feasible for the applicant to pursue training."

[Appellant] having completed a course * * * would be employable in his field of training. There was no justification provided with his application that he was no longer able to work in his field of training.

* * * Therefore, it is the position of this office that: A) [appellant] could not be served due to the fact that he received prior services and is considered employable; and B) the resources of the agency are limited to the extent that a repeat service would be considered a low priority.

Following receipt of the Area Director's response, the Board attempted to obtain a copy of 82 BIAM from the Area Office. The Board was furnished with one page from the BIAM, which, out of context, was meaningless. It attempted unsuccessfully to obtain the surrounding material. The Board was informed that the Area Office "never" gives out copies of the BIAM or information contained in it. 4/

Discussion and Conclusions

In Colbert v. Muskogee Area Director, 18 IBIA 92, 95 (1989), the Board recognized the limited availability of funds for the AVT program and analogized the situation to other grant programs where BIA must allocate limited funds. The Board stated that "when the funds available for a program are less than the amounts requested under that program, BIA must determine how best to allocate those limited resources. The allocation determination will be upheld when it is reasonable and objective." See also Zarr v. Acting Sacramento Area Director, 18 IBIA 290, 293-94 (1990). Despite this deference, the Board reviews such decisions to ensure that proper consideration was given to all legal requirements.

[1] The Area Director based his decision on 25 CFR 27.5(e) when he held that requests for repeat AVT services have a lower priority than initial requests. However, after considering the Area Director's further conclusions and explanations, the regulations in 25 CFR Part 27, the Supreme Court's decision in Ruiz, and the Board cases following Ruiz, the Board cannot uphold the additional restrictions which the Area Director placed upon repeat services, *i.e.*, that repeat services are available only to persons who were unable to complete their initial training or were medically unable to work in the field in which they were trained. Those restrictions go beyond the regulations in 25 CER Part 27, which allow repeat services for a person who is unemployed or underemployed. For purposes of this decision the Board will assume that the additional restrictions actually appear in the BIAM. The Board has consistently held that provisions contained only

4/ The Board routinely receives copies of sections of the BIAM which are raised in cases before it. The Area Office's failure to provide the Board with this requested information lends credence to appellant's statement that he was not given a copy of the BIAM provisions.

in the BIAM are without the force of law when sought to be applied against parties outside the BIA. See Bekis, supra; Carter, supra; Allen, supra.

In addition, the Area Director has not disputed appellant's statement that he was not given "actual and timely notice of the terms" of the BIAM provisions within the meaning of 5 U.S.C. § 552 (1988). Under these circumstances, the restrictions not found in the regulations in Part 27 cannot be applied against appellant to deprive him of repeat AVT services. The Board does not hold that appellant must be approved for repeat AVT services. It does hold that, in order to deny appellant those services, the Area Director must base his decision on the regulations, not on the BIAM.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Sacramento Area Director's December 7, 1992, decision is reversed, and this matter is remanded to him with instructions to issue a new decision based upon the regulations in 25 CFR Part 27.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge